U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL L. BAXTER and U.S. POSTAL SERVICE,
POST OFFICE, Cranford, NJ

Docket No. 02-207; Submitted on the Record;
Issued August 8, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that the disability causally related to his 1975 employment injury had ceased; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128 constituted an abuse of discretion.

On May 14, 1975 appellant, then a 24-year-old postal clerk filed an occupational disease claim alleging that duties of steady lifting and standing from January 5, 1974 through May 14, 1975 caused pressure and pain in both legs, and aggravated a preexisting physical condition to his lower extremities. He sustained a prior nonwork-related injury while serving in Vietnam for the U.S. Marine Corps in 1970. Appellant came into contact with an exploding box mine and sustained open fractures from the hips down due to shrapnel wounds. He retired from military service with 100 percent disability. The Office accepted the claim for aggravation of multiple injuries to the lower extremities. In 1975, appellant became totally disabled from federal employment and received appropriate compensation and ongoing medical treatment for chronic osteomyelitis of his right tibia and continual problems with his lower extremities.

In 1992, the Office learned that appellant was self-employed in the construction industry while receiving compensation benefits for total disability and that he knowingly failed to report his employment and earnings to the Office. It was determined that appellant performed duties in his business including drywall and painting along with other construction tasks. On April 22, 1992 the Office found that appellant's compensation benefits for the period February 19 through October 15, 1991 were forfeited on the grounds that he knowingly failed to report his employment and understated his earnings. On October 9, 1992 the Office denied modification of the prior decision. The overpayment was withheld from appellant's monthly compensation checks; however, he continued to receive medical care for residuals of the employment injury.

On October 1, 1999 the employment establishment informed the Office that appellant was again employed in construction, performing tasks including loading and unloading materials and mixing drywall products. On November 18, 1999 the Office referred appellant to

Dr. Thomas Dempsey, a Board-certified orthopedic surgeon, for a second opinion examination in order to determine whether he had any continuing injury-related residuals.

On January 10, 2000 the Office proposed to terminate appellant's entitlement to compensation based on the medical opinion of Dr. Dempsey that appellant had no residuals of the 1975 employment injury and was capable of working in his date-of-injury position as a mail clerk. In a report dated December 28, 1999, Dr. Dempsey stated:

> "The accepted conditions, that is the osteomyelitis and the problems that he has had with his lower extremities, are ongoing problems that occurred when he had the original injury in Vietnam. In my opinion, he will continue to wax and wane with these problems but I do not know how his condition could be made permanently worse by any type of activity *per se*. If he was working before 1975 in any capacity I cannot imagine what type of activities, especially if it was sedentary, would aggravate a preexisting condition and make it permanent. It may cause him to have some discomfort temporarily but that should return to the previous level of comfort or discomfort in a short period of time. It is true that he has significant injuries to both lower extremities but you cannot blame the symptoms he is having now on any event that he had in 1975.
>
> "I would think that he could do the job as a mail clerk if he was doing it before 1975 as well now as he was doing at the time that he claimed that the duties as a mail clerk caused him problems. Therefore, any disability that he has now is based on the injury that he had in Vietnam and not any problems that he had with his employment. Therefore, in my opinion, he could return to the previous occupation as a mail clerk."

On February 10, 2000 the Office terminated appellant's compensation. The Office found that the medical evidence established that appellant no longer had any condition attributable to his employment duties in 1974 and 1975, but that all of his lower extremity problems were related to his injury sustained during prior military service.

On February 2, 2001 appellant through counsel requested reconsideration and submitted an undated medical report from Dr. M.F. Longnecker, Jr., a Board-certified orthopedic surgeon, who stated:

> "It is my opinion that all of his problems with the exception of subtrochanteric fracture of his left hip and the fracture of the supracondylar area of the left knee as a result of an automobile accident two years ago were aggravated by his job while employed in the postal service in 1975. Specifically these problems were from the previous fracture of the right tibia with chronic osteomyelitis; also aggravation of his previously fused left knee. There has obviously been over the past 25 years further impact on his ability to get about and ambulate because of the chronic problems relative to his lower extremities. I doubt that any of this is going to change with time…. He is in my opinion disabled for any and all forms of gainful employment and remains so permanently."

Appellant submitted a report dated September 25, 2000, from Dr. Joe Jackson, a Board-certified neurologist, who also opined that appellant was disabled from work. He attributed

appellant's dysfunction and disability to his condition following the 1971 military injury to his lower extremity, to an automobile accident in 1997 in which he refractured his lower extremity and to a recent finding of significant angina and loss of hand use.

Appellant further submitted an undated report with notations from Dr. Richard Furr, attending physician, who stated:

> "[Appellant] still has occurrence with osteomylitis (sic) of the right tibia, that occurs around every four to six weeks, for which he receives treatment in the form of antibiotic therapy, pain management for arthritis and wound care, from the V[eteran] A[dministration] Medical Center in Biloxi, Mississippi. His left leg is permanently fused from a war injury. He also has loss of strength to the left hand. I see no improvement at this time where [appellant] can or is able to return to work."

In a decision dated April 6, 2001, the Office denied modification of the February 10, 2000 decision. The Office found that the evidence was devoid of a rationalized opinion based upon a complete factual and medical background showing causal relationship between the current bilateral leg condition/disability and the postal clerk duties that occurred between January 5, 1974 and May 14, 1975 of standing and lifting.

On July 5, 2001 appellant, through counsel, requested reconsideration and submitted additional evidence. In a decision dated July 27, 2001, the Office denied appellant's request for reconsideration on the grounds that he failed to either raise substantive legal questions or include new and relevant evidence.

The Board has duly reviewed the case and finds that the Office properly terminated appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization of medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[4]

As there is no rationalized medical evidence supporting continuing disability after February 10, 2000, the date of the Office's decision, and as Dr. Dempsey provided a well-rationalized report finding that appellant had no disability causally related to his accepted

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id*.

[3] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[4] *Id*.

osteomyelitis and lower extremity problems, the Office met its burden of proof to terminate appellant's compensation benefits.

Appellant submitted medical evidence by three physicians who support disability, however, none of these physicians sufficiently identify that appellant's condition, disability and need for further medical treatment on or after February 10, 2000 were causally related to the employment duties performed 25 years prior in 1975. Dr. Longnecker did state in his undated report that appellant's previous fracture of the right tibia with chronic osteomyelitis, and problems with his previously fused left knee and lower extremities was aggravated by his job while employed in the postal service in 1975. However, he did not specifically discuss how appellant's mail clerk duties of lifting and standing 25 years prior could have directly caused continuing residuals on or past February 10, 2000, particularly since appellant refractured his lower extremity in an automobile accident in 1997 following his federal employment. Dr. Jackson in his September 25, 2000 report opined that appellant was disabled from work, however, he attributed his condition to the 1971 military injury to his lower extremity, to the automobile accident in 1997 and to a recent finding of significant angina and loss of hand use. He did not specifically relate any continuing disability or need for medical treatment on or after February 10, 2000 to the 1975 accepted employment duties. Dr. Furr in his undated report discussed appellant's war injury and that appellant had loss of strength to the left hand and still had occurrence with osteomylitis of the right tibia every four to six weeks, for which he received treatment. Although he found appellant incapable of working at the time of his report, he also failed to specifically connect appellant's disability to the 1975 employment injury.

No injury-related residuals, disability or need for medical treatment causally related to appellant's accepted condition was identified by appellant's three physicians on or after February 10, 2000. The Office properly relied on Dr. Dempsey's report as the weight of the medical evidence of record in establishing that appellant had no disability or injury residuals requiring further medical treatment after February 10, 2000, a date almost 25 years after his 1975 accepted injury, causally related to his employment duties as a mail clerk. Accordingly, the Office has discharged its burden of proof to justify termination of appellant's compensation on or after February 10, 2000.

The Board further finds that the Office properly denied appellant's July 5, 2001 request for reconsideration under 5 U.S.C. § 8128.

In his July 5, 2001 request for reconsideration, appellant raised several arguments regarding the credibility of medical reports, whether specific work duties should be considered, and the duration of the second opinion medical evaluation. However, these arguments were not substantive, as the only pertinent evidence in this case would be of a medical nature which established continuing residuals of appellant's work duties in 1974 and 1975. Appellant also resubmitted medical reports including those by Drs. Longnecker and Furr, which, with the second submission, contained dates that were initially omitted. The reports have been previously considered by the Office and therefore are insufficient to warrant a merit review. He further submitted a May 7, 2001 letter from Dr. Longnecker for the purpose of providing a date to his original report; however, it provided no new information discussing how appellant's employment duties, 25 years prior could have continued to aggravate his preexisting condition. Appellant further submitted a work capacity evaluation and report from Dr. Furr dated April 21, 1994. This report is clearly insufficient to support disability on or after February 10, 2000 as it discussed

appellant's condition six years prior when appellant was receiving compensation benefits due to the accepted condition.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision, which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[5] Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[6]

The Office, in denying appellant's application for review, properly noted that appellant had not raised any substantive legal questions nor included any new and relevant evidence and, therefore, appellant's request did not constitute a basis for reopening a case.[7] As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated July 27 and April 6, 2001 are affirmed.

Dated, Washington, DC
August 8, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[5] 20 C.F.R. § 10.606(b).

[6] 20 C.F.R. § 10.608(b).

[7] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).